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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1169

CHARLES E. KIRKLAND and EDDIE ALLEN HOUSTON,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

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CHARLES E. KIRKLAND and EDDIE ALLEN HOUSTON,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled case on November 17, 1967.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee entered on November 17, 1967, affirming Petitioners' convictions is unreported and printed in Appendix A to this Petition, *infra.*

JURISDICTION.

The judgments of the Supreme Court of Tennessee, Appendix B, affirming Petitioners' convictions were entered on the 17th day of November 1967. On the 12th day of February 1968, Mr. Justice William Brennan, Jr. entered an order extending the time for filing of a Petition for Certiorari herein to and including March 1, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec.

1257(3) since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. When a citizen, known by the arresting police officer to be under suspicion of felony, is placed under arrest on a charge of driving without a driver's license as an excuse to hold him, and is searched by the arresting police officer, does a general and exploratory search by others of his person and automobile *coming sometime later* violate his rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution?

II. Does an arrest on a charge of "no driver's license" and a search made pursuant thereto violate the Fourth, Fifth and Sixth Amendments when such arrest and search were made as an excuse and a subterfuge in order to seek evidence of a felony of which the person searched was under suspicion?

III. Does the comment of a prosecuting attorney that specific evidence is undenied violate the Fifth Amendment self-incrimination clause when that evidence could only be denied or contradicted by the testimony of the defendants who chose to exercise their Fifth Amendment rights not to take the stand?

IV. Does the lack of specificity of the indictment in a criminal case violate the due process clause of the Fifth Amendment when the indictment charges the burglarizing of one business house on a certain date, and the evidence shows the burglarizing of three separate telephone booths, i.e. not business houses, on a day later?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V:

"No person shall * * * be compelled in any criminal cause to be a witness against himself, nor be deprived of life, liberty, or property without due process of law: * * *

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Emphasis added.)

Tennessee Code Annotated, Sec. 59-709:

"Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the Division, *provided, however, that it shall be unlawful for any law enforcing officer of this state, except a state patrolman*

or officer of this Division," (highway patrol), "to demand the exhibition of said licenses, unless the operator of said motor vehicle shall then be or immediately prior to such demand, have been engaged in a violation of any municipal ordinance or statute law of this state." (Emphasis added.)

STATEMENT OF THE CASE.

Petitioners Kirkland and Houston were convicted for the burglary of a telephone booth and ten year sentences were fixed by the jury (BE 191, 192).

On April 27, 1961, they were under surveillance of law officer Burnette and Sheriff Cannon, who observed the Petitioners enter a phone booth ("Whaleys") (BE 42). Kirkland, after arriving there, placed an object under his arm. After Petitioners departed, Officer Burnette and a Mr. Hindman, security officer for the Southern Bell Telephone and Telegraph Company, went to the phone booth and discovered the coin box missing (BE 46). Twice more during that day, Petitioner Kirkland and two others (but not Houston) were observed in phone booths, after which in each instance the coin box was discovered to be missing (BE 138-139, 140-141).

1. The next day Petitioner Houston was arrested while driving his automobile in nearby Polk County by Officer Ott White. Officer White admittedly made the arrest solely on the ground that Houston had "no driver's license," (Supplemental Transcript Ex. 10 "ST10" p. 15,[1] BE 122, Brief of State in Tenn. Sup. Ct. p. 7), admitted that he had no authority in Polk County (ST10 p. 8, lines

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[1] Supplemental Transcript Exhibit 10, hereafter ST10p, is a part of the record on appeal and is the transcript of a preliminary hearing on the no driver's license charge before the Honorable Frank Hammond on May 21, 1966.

15-19) but made it as a citizen's arrest (ST10 p. 15), *and that indeed the arrest was simply made as an excuse to hold Houston.* (ST10, p. 16, lines 17-18.) Although White couldn't remember if there was a warrant for robbery in existence at the time (BE 124), it is clear that no warrant for Houston's arrest (or search) had been obtained (ST10 pp. 26, 39).[2]

White and other officers had been looking for Houston's car (apparently in the light of the surveillance of his activities in the telephone booth on the previous day) (ST10 p. 3).

Immediately after the arrest, White searched Petitioner and his car (ST10 p. 10) and placed him in his Police car (ST10 p. 11, BE 89). At this time, he found nothing. *Sometime later Officer Burnette and M. B. Matheny, a member of the Tennessee Bureau of Investigation, arrived and a second search was conducted.* (Opinion App. A, *infra* p. 21, State's Brief, Sup. Ct. Tenn. p. 7, BE 118, l. 2-3). Matheny who claimed his authority to investigate any criminal activity stemmed from the Attorney General of Tennessee (ST10 pp. 31-32), but apparently has none in law, principally conducted the second search. He ordered and compelled Houston to empty his pockets into a sack (ST10 p. 29, 33, BE 102, 106) and discovered a

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[2] No other conclusion is possible. Matheny says (ST10 p. 26) that no warrant had yet been obtained. Officer Bates says (ST10 p. 39) that the information that the Chief of Police obtained relative to a warrant came from Matheny. White couldn't be sure (BE 124). At any rate when asked (ST10 p. 15, l. 13):

> Q. In other words, whatever you had you arrested this man on the basis of it?—(A copy of a warrant), White replied (l. 15)—
>
> A. I arrested him on—for no driver's license.

and admittedly White stopped him to examine his registration papers (BE 126 ll. 12-17). See also testimony of Officer Burnette BE 66, Hindman BE 154.

lock-pick under a seat (ST10 p. 34, BE 99, 101). Although he had never seen such an instrument before, he turned it over to telephone security officers, who, in turn, turned it over to the Sheriff (ST10 p. 20). This, together with certain keys, which he later recovered from the Sheriff's office (ST10 p. 23) were presented by him as evidence, over objection (ST10 p. 21) in the preliminary hearing. The keys were originally given White during the course of and were the product of Matheny's general search and seizure (Op. App. A, *infra* p. 21). In the trial one key was identified as fitting the housing of the tampered with telephone at Whaley's and together with the lock-pick were admitted in evidence over objection based on the Constitutional grounds raised here (raised BE 88, and overruled 89, raised and overruled 99-100, again 100-108, 130). Petitioners' Motion for New Trial (Ground II), again raised their contention that admission of this evidence (the product of illegal arrest and search) was unconstitutional; and was again overruled. The issue was preserved in the appeal to the Tennessee Supreme Court (there Assignment of Error Number Four). The facts found by the Supreme Court of Tennessee (Opinion, App. A):

> "Houston, while driving his automobile, was apprehended by a Deputy Sheriff. This Deputy asked Houston for his automobile registration and his driver's license. *When Houston could not produce either, the Deputy placed him under arrest for 'No Driver's License.' At this point, Houston got out of the car, was searched by the Deputy for a weapon, and placed in the patrol car. Sometime later, the Sheriff and a TBI Agent arrived and searched the defendant's person again. These two also searched Houston's car. It was this latter search of Houston's person and his car which produced the keys and the 'lock-pick'.*"

2. In closing argument, the Attorney General mounted an argument that Petitioners who were registered at the Diplomat Motel could have used the phone there but instead chose to go to several different pay phones. He then used this as a touchstone to call the jury's attention to the failure of the defendant to take the stand:

> "I want to ask you this, gentlemen of the jury: They were down here at the Diplomat Motel and they could have used the phone down there free. But, no, they went out this way to use the pay station phone. Then after they got through there, went out over here to use the pay station phone. And then went back over here to use the pay station phone."
>
> *"Now, what explanation do they have of that?"*
>
> *"Well, now, that's all undenied in it. That's all undenied."* (BE 186.)

Again, (at BE 187):

> "* * * *all the way through this record there's not been any attempt made, there's not nobody been impeached.* It's admitted, gentlemen of the jury, that these two men, something * * *."

And, yet again (BE 188):

> *"Now, then, gentlemen of the jury, is there any denial that they were out there at this place, out here at Whaley's?"*

Whaley's was the telephone booth which the two Petitioners, according to prosecution testimony, were seen to enter together, after which the coin box was missing (BE 42).

Objection was timely interposed on Fifth Amendment grounds and ruled on favorably to the defense (BE 188-9). Notwithstanding the Attorney General returned once

again to the forbidden area saying (BE 189) in reply to the ruling *and indeed flouting the same in the presence of the jury* (at p. 189, lines 2-10):

> "The Court: Yes, I think Mr. Attorney General you shouldn't refer * * * about the denial part of it.
>
> Mr. Taylor (Attorney General): *Well, I say, it's just undenied.*
>
> The Court: You mustn't go any further.
>
> Mr. Taylor: Well, that's as far as it will go." (Emphasis added.)

The objection was preserved in Petitioners' Motion for New Trial (Ground VIII thereof), and in the appeal in the Tennessee Supreme Court (Assignment of Error No. One).

The Supreme Court of Tennessee held in this respect (App. A, p. 20):

> "What occurred was that the Attorney General did remark, more than once, to the effect: 'Now, what explanation do they have of it?' and, 'That's all undenied.' Here, the prosecutor is commenting on the failure of the defense to explain or rebut certain facts. This is not comment on failure of the defendants, themselves, to testify, or the equivalent thereof."

3. The Petitioners were convicted on a charge that they "on the 27th day of April 1966, in the County aforesaid, unlawfully, feloniously and forcibly did break and enter into a certain house in the nighttime, to-wit: the *business house* of Southern Bell Telephone and Telegraph Company, a corporation, with intent * * *." This Count was objected to by a pretrial written motion to quash and/or dismiss on the grounds that it was unconstitutionally vague and defective. The Motion was denied. The objection was preserved at trial (BE 8, 10, overruled BE 21), in Petitioners' Motion for New Trial after conviction (Ground I), and in the appeal to the Tennessee Supreme

Court (Assignment of Error Three, and see Assignment of Error Seven).

Despite the date of *April 27th* in the indictment the evidence was that whatever happened took place on the *28th*. Despite the charge that *a "business house"* (a single business house) was broken into the evidence adduced was that *three telephone booths* were the subject of larcencies (Sup. Ct. Tenn. Opinion, App. A, p. 17, *infra*).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The arrest and search of Houston were not lawful or constitutional in any meaningful sense. In *Preston v. United States*, 376 U. S. 364 (1964) the court struck down a subsequent search at the police station of an automobile in which petitioner had been prior arrested on a vagrancy charge. In *Cooper v. California*, 386 U. S. 58 (1967) Mr. Justice Black in permitting a similar search of an automobile when petitioner had been arrested on a felony charge distinguished *Preston*. In the case at bar, Petitioner Houston was arrested simply on a charge of "no driver's license" admittedly as a pretext to hold him. In this respect the case only differs from *Preston* in that in this case the Supreme Court of Tennessee has found that there were grounds for suspecting the Petitioner guilty of a felony. If so, the arrest should have been made and justified on such grounds. No attempt to make or justify the arrest on this ground was ever made. Indeed Officer White continually adhered to his position that the arrest was for "no driver's license" only. In sum here, as in *Preston*, the arrest and the fruit thereof, are in truth justifiable only in the light of the fruit. The distinctions in *Chapman i.e.* the arrest of petitioner there on felony

charges, and the contraband character of the auto in view of its use in narcotics traffic, are absent here, and the case is thus more nearly like *Preston.*

Notwithstanding *Warden v. Hayden,* 387 U. S. 394 (1967) extends the concept of the scope of permitted search, the second search here goes even beyond a search for evidence. The total emptying of pockets into a sack, and the seizure of items the like of which the searcher never saw before (i.e. Matheny's seizure of the lock-pick) are reminiscent of the general and exploratory searches long struck down by this Court. *Go-Bart Importing Co. v. United States,* 282 U. S. 344; *United States v. Lefkowitz,* 285 U. S. 452; *Kremen v. United States,* 353 U. S. 346. Indeed the pretext of an arrest in order to make warrantless search of an exploratory nature, in order to obtain evidence against him searched is inexcusable. *United States v. Harris,* 321 F. 2d, 739 citing *United States v. Lefkowitz,* 285 U. S. 452; *Hans v. United States,* 331 U. S. 145; *Abel v. United States,* 362 U. S. 217, 225, 226; *Jones v. United States,* 357 U. S. 493; *Worthington v. United States,* 166 F. 2d, 557, 566; *Taglavore v. United States,* 291 F. 2d, 262, 265; *Henderson v. United States,* 12 F. 2d, 528; and see *Ker v. California,* 374 U. S. 23. This was not a search for evidence, fruits or instrumentalities but a seizure of all—a simple unreasonable exploration. In *Stanford v. Texas,* 379 U. S. 476, the Court held that even under a warrant a general exploratory search hoping in a shotgun way to obtain evidence was illegal.

Underlying is a core problem of constitutional law. May an officer, even if he has grounds to suspect an individual of felony, arrest him on a contrived, inspired as it were, charge of driving without a license simply in order to search him and his car for evidence of some felony. The problem posed becomes unusually acute when (i) the

officer making the arrest has no authority to arrest on the ground that petitioner had no driver's license; [3] and indeed admits that he was without any authority to make the arrest, *supra* pp. 4-5 and (ii) it is painfully evident that no arrest would have been made—indeed would not have been considered but for the ulterior motive—the search for an excuse to search. Thus the arrest of Houston was wholly unreasonable and unlawful. Bootstrapping rationalization cannot transform the original arrest and search into a lawful one. The test is not whether it was reasonable to procure a warrant, or what was turned up in the search, but whether the search itself was reasonable. In *Cooper, supra,* Mr. Justice Black's opinion would tend to argue (see especially his explanation of *Preston, supra*) that the search must seek instrumentalities, fruits or (now since *Hayden*), evidence of the crime for which the arrest was made and to which the search is incidental. Here the search and its purpose was totally unrelated to the arrest. Indeed to the extent that it may be argued that White needed to search or pat down the suspect to insure his safety (i.e. to discover if Houston was armed) the first search had accomplished that.

For White's original search was not the crucial one. It is the later search, for which the earlier improper arrest was contrived and utilized as a pretext to hold the suspect, that produced the poisoned fruit here. To sanction the

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[3] Tenn. Code Annotated 59-709, makes it unlawful for all except a highway patrol officer—which White was not—"to demand the exhibition of said licenses," unless the car operator, "shall then be or immediately prior * * * have been engaged in violation of a municipal ordinance of statute law of this State." No effort was ever made to demonstrate that the exception applied here. Indeed even highway patrol officers must act in good faith in this respect and pretext or subterfuge in order to inspect a vehicle is improper, *Robinson v. State,* 184 Tenn. 277, 198 S. W. 2d 633, and violates petitioners' rights against self incrimination, *Cox v. State,* 181 Tenn. (1944).

rationalization indulged in by Tennessee's Supreme Court, i.e. there may have been grounds for a potentially legal arrest and search incidental thereto, a search made not at the time of arrest, but "sometime later" to discover evidence of the crime for which the suspect was not detained, is still a reasonable and legal one can but resurrect those evasions and abuses which led to the erection of *Mapp, Mapp v. Ohio,* 367 U. S. 643. Certainly, at least in spirit, such procedure would violate the notice requirement that an officer seeking to execute a search warrant announce his purpose, see *Ker v. California, supra,* and compare, *Commonwealth v. Newman,* 232 A. 2d 1 Pa. Sup. Ct. (1967). It would be a strange rule which would require an officer armed with a warrant to announce his authority to search openly, but permit the one without court sanctioned warrant to operate behind a cloak of ruse and deception. Whatever justification there may have been for a search incident to White's arrest either to discover weapons about Houston's person (for the safety of the officer) or to discover fruits, instrumentalities, or evidence of the crime (if one can imagine any fruits, instrumentalities or evidence of the crime of "no driver's license") had been ended by White's search. Successive exploratory searches "incident to an arrest" to discover evidence of any crime or many crimes should not be read into *Hayden,* see also 81 *Harv. L. R.* 119, 117-121. Even an arrest lawfully made is not a license to search at random. *Kremen v. United States,* 353 U. S. 346.

Little imagination is needed to envisage the great danger to constitutional liberties implicit in the instant decision. If sanctioned by this Court, albeit tacitly by denial of certiorari here, state officers would receive a carte blanche to arrest persons suspected of wrong doing on technical, contrived, minor charges with the underlying

secret but primary intent and purpose of making general exploratory and constitutionally forbidden searches. The resultant would nullify the mandate of the Fourth Amendment and sap the vitality of *Mapp*.

2. So far as it goes, but without regard to the facts as they exist, the argument of the State accepted by the Supreme Court of Tennessee seems sound, i.e. that an argument that Petitioners have not rebutted, denied or contradicted evidentiary matter does not *of necessity* contravene the doctrines erected in *Griffin v. California*, 380 U. S. 609 (1965) and *Chapman v. California*, 386 U. S. 18 (1967). Nonetheless, in the context of the remarks as made, no other effect could ensue, nor other result be intended than to precisely call the attention of the jury to Petitioners' choice to invoke their Fifth Amendment rights not to testify. It is interesting to note that the aspect to which the Attorney General sought to make the disingenuous comment was the going to a telephone booth at Whaley's by the two Petitioners alone. Of necessity, if there was to be denial, the Petitioners would have been required to make the denial and it was plainly apparent to the jury that it was the Petitioners who were being "called" for failing to take the stand and making the denial or contradiction. In substantially similar circumstances in *Desmond v. United States*, (CA 1) 345 F. 2d 225, 14 ALR 3d 718, in proceedings in the United States District Court for the District of Massachusetts, under 28 USC Sec. 2255, one of the Petitioner's contentions was that the government's statement in final argument that the government witness stood "unimpeached and uncontradicted" constituted improper comment on the petitioner's failure to testify, and that the error was not cured by the trial court's instruction in its subsequent charge to the jury that no inference should be drawn against the petitioner

from his failure to take the stand. On appeal by the petitioner, the United States Court of Appeals for the First Circuit ruled that the government's statement in its final argument constituted improper comment on the petitioner's failure to testify, *since the government's witnesses could have been contradicted only by the petitioner or his co-defendant, who could not have been put on the stand against his will, and that the error was not cured by the trial court's instruction in its subsequent charge to the jury.* [4]

The rationale of *Griffin* will have little vitality if prosecution comments such as sanctioned here are permissible. By selecting an evidentiary fact that could only be denied or contradicted by the then defendant's own testimony, and arguing that it stands undenied, the prosecutive lawyer will ever be able to evade the madate of *Griffin;* and as was done here, effectually focus the jury on the failure of defendant to take the stand and make the denial. Review here is necessary to adopt as a rule mandatory on the States the rule erected by the First Circuit in *Desmond, supra*; compare reasoning of Stewart, *J.* concurring in *Chapman, supra,* and see 81 *Harv. L. R.* 207.

The conflict in approach between the ruling of the First Circuit in *Desmond* and of Tennessee here forshadows a wide conflict in rulings (Federal and State) and urges grant of certiorari in this case.

3. In order to comply with the requirements of due process, an indictment must set forth the charge with specificity. *Fontana v. United States,* 262 Fed. 283 (1919);

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[4] The ruling by the court in this case on the Petitioners' objections to the comment was far weaker and certainly failed to cure the vice, see e.g. *Chapman, supra.* In any event the prosecutor's persistence over the Court's ruling nullified any ameliorative effect here.

United States v. Hess, 124 U. S. 483, 488 (1888). For it is obvious that an unspecific charge will deny a defendant the protection of the once in jeopardy clause of the constitution. The effect of the charge here was that the Petitioners were charged with burglarizing *a* (one) business house on April 27th. But of what do they stand convicted? There is evidence that coin boxes from three telephone booths were stolen. Are Petitioners convicted of burglarizing one or all? And, if one, which one? And the description of a business house in common understanding hardly conjures up a picture of a telephone booth, nor vice versa would a telephone booth in common parlance be defined as a business house. Thus even by adverting to the trial record the precise charge on which Petitioners stand convicted cannot be with specificity ascertained. Indeed, both due process and the right to have benefit of the double jeopardy clause are offended.

The practice of presenting inspecific shotgun generalized indictments cannot be condemned too strongly. In recent years this practice has acquired numerous adherents among state prosecutors seeking flexibility in order to enable them to present whatever case appears most promising at the time of trial, and in order to avoid being "pinned down" to investigative facts available at time of charge; thus avoiding both the necessity of careful fact determination before indictment *and of really giving notice to defendants of that against which they must defend, i.e. of revealing the theory of the prosecution's case.* But notice of that which they must defend against is precisely what is fair notice, and what the Constitution demands. The constitutional rights of defendants cannot be disregarded. The instant case is a glaring example. Under the instant indictment, Petitioners were apparently tried on one charge for one crime; yet evidence was introduced

of three crimes, none of them, at least on the face of things, the one charged in the indictment; and even if they stand convicted of one, no one can say which.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE SUPREME COURT OF TENNESSEE.

This appeal comes from the Criminal Court of Bradley County. The parties will be referred to as they appeared in the lower court; that is, plaintiffs in error Kirkland and Houston as the defendants, and defendant in error as the State.

On November 28, 1966, the defendants were convicted, on pleas of not guilty, of burglary in the third degree. The punishment of each defendant was fixed by the jury at ten years in the State Penitentiary. These indictments grew out of an investigation into a series of thefts from telephone booths. The investigation had been carried on by the security department of Southern Bell Telephone & Telegraph Company, the Tennessee Bureau of Investigation, the Bradley County Sheriff's Office, and the Cleveland, Tennessee Police Department.

On April 28, 1966, the defendants were observed, by an officer of the Cleveland Police Department and a security investigator for Southern Bell, carrying on some surreptitious activity in and about a pay telephone booth. Upon investigation, it was found that the telephone had been tampered with and its coin box was missing. No arrest was made at that time. Similar observations were made on two other occasions, at other locations; but, on these latter occasions, the activity was conducted by defendant Kirkland and two other men, unaccompanied by defendant Houston.

Demonstrative evidence introduced at the trial included a set of keys, one of which fit the telephone which had been tampered with, and a "lock pick," an instrument employed in the picking of telephone locks. Both the keys and the "lock pick" were recovered from defendant Houston the day following the break-ins.

A number of assignments of error have been filed. However, the contentions made will be dealt with primarily by subject.

The validity of the indictment is questioned by two assignments of error. It is first argued that the trial court should have granted a motion to quash the indictment because the description of the property broken into was too vague to apprise the defendant of the charge against him. That description was that the defendant did "* * * break and enter into a certain house in the nighttime, to-wit: the business house of Southern Bell Telephone & Telegraph Company, a corporation * * *." This contention has no merit whatever.

It is also contended that the indictment contains a fatal variance, in that it shows the date of the offense as being April 27, 1966, when the State's proof showed that the offense was committed on April 28, 1966. It is settled beyond room for cavil in Tennessee that when time of commission of a crime is not of its essence, the fundamental test of validity of an indictment is whether or not the defendant received adequate notice of the crime of which he was charged. See *State v. Yates* (1965), 217 Tenn. 160, 395 S. W. 2d 813; *Green v. State* (1940), 176 Tenn. 449, 143 S. W. 2d 713; both opinions discussing the significance, or lack of it, of disparity between the time alleged in an indictment and that shown by the evidence. Applying the test, as discussed in these cases, we cannot conceive of any way in which these defendants could have been prejudicially misled. The indictment in this case was not defective in either aspect.

By assignment of error No. 2, counsel for the defendants complains of multiple instances where the trial judge made rulings in the process of trial. Any discussion of these, seriatim, would unduly prolong this opinion. None-

theless, this Court has examined all of the instances mentioned, wherein the defendants say a mistrial should have been granted. None of such instances are of sufficient magnitude to justify the action defendants insist upon. After considering all that counsel has to say on this subject, a close study of the bill of exceptions makes it clear to this Court that the trial judge conducted a fair trial. The substance of these allegedly prejudicial acts and statements were fairly and accurately acted upon by the trial judge. This was a bitterly contested trial, and the zeal of both the defendants' counsel and the Attorney General made it necessary for the trial judge to intervene, from time to time, in the interest of orderly proceedings. The record shows that all of his actions were predicated on insuring that the defendants received a fair trial, and that the jury received only competent evidence. Experience has taught us that the criminal arena is repeatedly more productive of heat than of light.

The defendants rather vehemently argue that it was error to allow a witness to testify for the State who was not named on the indictment. They rely upon T. C. A. § 40-2407 as authority. That statute directs the Attorney General to endorse on the indictment the names of the witnesses he intends to summon. In interpreting this statute, this Court has held, in *Douglass v. State* (1964), 213 Tenn. 643, 378 S. W. 2d 749, that the prosecution is not limited by that statute, at the trial, to only those witnesses whose names appear on the indictment.

Under assignment of error No. 9, defendants only argue that which is part and parcel of the subject matter just discussed. Such assignment needs no singular discussion.

There is no basis for the defendants' assertion in the assignments of error that the court should have directed a

verdict because of material defects in the State's proof. The practice of direction of verdict is not applicable to proceedings at criminal law. See Caruthers History of a Lawsuit (8th Ed.) 963, § 363, and the cases there cited.

By assignment No. 8, the defendants say that the trial court erred in denying defendants' counsel use of a transcript of the testimony at the preliminary hearing, to examine the State's witnesses as to prior inconsistent statements. The record shows that the Court's action, in this regard, was both fair and proper. The trial court did not exclude counsel's use of transcript to show prior inconsistent statements, other than to the extent that such resulted from his exclusion of statements therefrom otherwise inadmissible as evidence.

One of the defendants' principal arguments is that the trial judge erred in permitting the Attorney General, in his closing argument to the jury, to comment "upon the defendants' failure to take the stand in their own behalf." What occurred was that the Attorney General did remark, more than once, to the effect: "Now, what explanation do they have of it?" and "That's all undenied." Here, the prosecutor is commenting on the failure of the defense to explain or rebut certain facts. This is not comment on failure of the defendants, themselves, to testify, or the equivalent thereof. The Court has held in *Schweiser v. State* (1966) ____ Tenn. ____, 399 S. W. 2d 743, that arguments by counsel for the State to the effect that the State's evidence is "uncontradicted" were not erroneous as drawing the attention of the jury to the failure of the defendants to testify. We see no difference between the terms "uncontradicted" and "undenied." See also *Hays v. State* (1929) 159 Tenn. 388, 19 S. W. 2d 313, where the reasons for these conclusions are lucidly stated.

The contention which has given us most concern is that which insists that the introduction of the demonstra-

tive evidence was error because it was obtained by an illegal search and seizure. The keys and the "lock-pick" mentioned heretofore were taken from the defendant Houston the day following the burglary for which defendants are on trial. The facts of this occurrence are that defendant Houston, while driving his automobile, was apprehended by a Deputy Sheriff. This Deputy asked Houston for his automobile registration and his driver's license. When Houston could not produce either, the Deputy placed him under arrest for "No Driver's License." At this point, Houston got out of the car, was searched by the Deputy for a weapon, and placed in the patrol car. Some time later, the Sheriff and an FBI Agent arrived and searched the defendant's person again. These two also searched Houston's car. It was this latter search of Houston's person and his car which produced the keys and the "lock-pick."

From the record it appears that the Deputy apprehended the defendant with reasonable ground to believe that Houston was one of the suspected persons in the telephone burglaries. He had been given information of the burglaries and a description of Houston and his car.

The defendants' position is that the arrest of Houston for not having a driver's license was a mere subterfuge for stopping him, searching his person and his car. For authority that such arrest and search were thus illegal, defendants rely on *Murphy v. State* (1953), 194 Tenn. 698, 254 S. W. 2d 979. The situation at bar, however, is factually different from that before the Court in the case cited. In that case, the defendant was stopped by the Highway Patrol, requested to present his driver's license for identification, and was then held by one of the officers, while the other went to get a search warrant. This action was motivated only by suspicion that Murphy might be illegally transporting whiskey; that is, suspicion generated

by Murphy's reputation in this regard. This Court there held that the arrest was illegal and the evidence obtained by the subsequent search therefore was also illegal and inadmissible. The search in that case was of a purely exploratory nature. Certainly, that was not a case, as is the present one, in which the arresting officer, at the time the arrest was made, had been authoritatively informed of the commission of a felony and that the defendant was one of the perpetrators. In addition, in the case now before the Court, the Deputy legally arrested the defendant Houston for not having a driver's license. It is true that at the same time, he had sufficient justification to arrest for burglary. The search was not made in connection with lack of driver's license. It was made in connection with the arrest for burglary, upon the arrival of the Sheriff.

It is our conclusion that the search of Houston and the search of his automobile was incident to a lawful arrest. It follows that the evidence procured by this search was legal and admissible at the trial.

It is complained, as to the defendant Kirkland, that the proceeds of the search should not have been admitted as to him. It is sufficient to say that this was not the evidence offered to implicate Kirkland. There was ample other evidence which implicated him as a confederate of Houston in the connection of the crime.

After a lengthy consideration of this case we find no merit in any of the assignments of error. Judgment of the trial court is affirmed, with costs of this appeal assessed against the plaintiffs in error.

LARRY CRESON,
Justice.

BURNETT, C. J., DYER, CHATTIN and HUMPHREYS, JJ., concur.

APPENDIX B.

JUDGMENT OF SUPREME COURT OF TENNESSEE RE EDDIE ALLEN HOUSTON.

(Entered November 17, 1967.)

Came the plaintiff in error Eddie Allen Houston in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Bradley County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiff in error, for his offense of Burglary in the Third Degree be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten (10) years, and not less than Three (3) years, commencing on the day taken into custody by the Sheriff of Bradley County being

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise, or giving evidence in the Courts of this State. The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Bradley County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Bradley County, which

will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

JUDGMENT OF SUPREME COURT OF TENNESSEE RE CHARLES E. KIRKLAND.

(Entered November 17, 1967.)

Came the plaintiff in error Charles E. Kirkland in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Bradley County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiff in error, for his offense of Burglary in the Third Degree be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten (10) years, and not less than Three (3) years, commencing on the day taken into custody by the Sheriff of Bradley County being Nov. 10, 1967.

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise, or giving evidence in the Courts of this State. The plaintiff in error will pay the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Bradley County,

directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Bradley County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.